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December 3, 1996

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, NW, Room 222  
Washington, DC 20554

*Re: Report of the Satellite Digital Audio Service Pioneer's Preference Review  
Panel: Request for Comments – Report No. SPB-67*

Dear Mr. Caton:

Digital Satellite Broadcasting Corporation ("DSBC") submits this letter in response to the Commission's request for comment on the Report of the Satellite Digital Audio Radio Services Pioneer's Preference Review Panel dated November 18, 1996.<sup>1</sup>

The Pioneer's Preference Review Panel ("Panel") was convened by the Commission in August to review three pending requests for pioneer's preferences for Digital Audio Radio Services ("DARS") licenses and to recommend to the Commission whether one or more of those requests should be granted. Although one of those requests was filed by DSBC,<sup>2</sup> DSBC has always maintained, and continues to maintain, that no pioneer's preference should be issued in the DARS proceeding in light of the development of DARS by others that predated the current DARS applicants' efforts.<sup>3</sup>

<sup>1</sup> *Evaluation of Pioneer's Preference Applications to the FCC That Were Submitted by Three DARS Applicants*, Report No. SPB-67 (Nov. 18, 1996) ("Panel Report").

<sup>2</sup> See Request of DSBC for Pioneer's Preference (June 2, 1993).

<sup>3</sup> See Reply of Digital Satellite Broadcasting Corporation, *Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services*, GEN Docket No. 90-357, at 28-29 and Appendix B (Declaration of Walter L. Morgan) (March 1, 1993) ("DSBC Reply"); Letter from W. Theodore Pierson, Jr., DSBC, to Donna Searcy, Federal Communications Commission (June 2, 1993); Letter from Diane S. Killory and Cheryl A. Tritt, Morrison and Foerster L.L.P., to Richard M. Smith and Donald H. Gips, Federal Communications Commission (Sept. 13, 1996) at attached Statement of Melvin Barmat ("Barmat Statement") at 6. DSBC has stated, however, that given the similarities between its system and CD Radio's system, if CD Radio is granted a pioneer's preference, DSBC must also receive one. Letter from Diane S. Killory and Cheryl A. Tritt, Morrison and Foerster L.L.P., to William F. Caton, Federal Communications Commission (Oct. 2, 1996) at 1-2.

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The Panel unanimously has come to the same conclusion, in part based on the reasons espoused by DSBC and in part based on the Panel's analysis of the merits of each preference request. In the time since the Panel issued its recommendation and the Commission requested comment on the Panel's analysis, however, one of the other DARS pioneer's preference applicants has withdrawn its preference request<sup>4</sup> and it is our understanding that another DARS pioneer's preference applicant will withdraw its request today. By letter filed concurrently with these comments, DSBC also withdraws its request for a pioneer's preference.<sup>5</sup> Together, these three withdrawals render moot the issue of whether any pioneer's preferences should be awarded to the DARS applicants and permits the Commission to proceed to adopt service and technical rules and to assign DARS licenses.

Although the withdrawal of all pending DARS pioneer's preference requests eliminates the need for the Commission to consider the Panel's recommendation, DSBC takes this opportunity to comment briefly on the Panel's analysis in case the Commission decides nevertheless to address this issue. The Panel's conclusion that none of the applicants is deserving of a pioneer's preference is fully supported by the facts. Based on its survey of "the considerable work that has been done [by others] toward the development of [DARS],"<sup>6</sup> the Panel properly determined that a pioneer's preference should not be awarded to any DARS applicant because most of the work done to develop DARS was done by others and predates the very existence of the current applicants.<sup>7</sup> Were the Commission to review the Panel's decision, this finding, by itself, would warrant the Commission's adoption of the Panel's recommendation. In addition, based on its review of each applicant's system, the Panel properly concluded that none of the applicants has brought DARS to a more advanced or effective state. The Panel identified "seamless service" as the touchstone for this portion of its analysis and properly concluded that no pioneer's preference was warranted.<sup>8</sup>

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<sup>4</sup> See Letter from Robert Briskman, Satellite CD Radio, Inc., to William F. Caton, Federal Communications Commission (Nov. 22, 1996) (withdrawing CD Radio's request for a pioneer's preference).

<sup>5</sup> See Letter from Douglas J. Minster, DSBC, to William F. Caton, Federal Communications Commission (Dec. 3, 1996).

<sup>6</sup> Panel Report at 1.

<sup>7</sup> *Id.* at 5. This conclusion by the Panel is consistent with DSBC's position in this case dating back to early 1993, even before the Commission opened a filing window for DARS pioneer's preference applications. DSBC Reply at 28-29 and Appendix B (Declaration of Walter L. Morgan); Barmat Statement at 6.

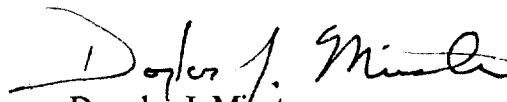
<sup>8</sup> Panel Report at 5. The Panel's use of "seamless service" as the measure of whether any applicant had advanced the DARS state of the art appears to be a response to a claim by CD Radio that its system would

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The peer review process employed by the Commission to assess the merits of the DARS pioneer's preference requests was, in our view, an appropriate and fair procedure. As a result, to the extent the Commission feels obliged to review the Panel's recommendation, it should adopt, without delay, the Panel's conclusion that no pioneer's preference be issued in this proceeding.<sup>9</sup>

In light of the withdrawal of all DARS pioneer's preference requests, as well as the Panel's recommendation that no pioneer's preference be awarded, the Commission should proceed to adopt service and technical rules and assign DARS licenses. Resolution of the long-pending DARS docket will allow for the introduction of this new service to the public.

Sincerely yours,



Douglas J. Minster  
Vice President, Corporate Development  
Digital Satellite Broadcasting Corporation

cc: Chairman Reed Hundt  
Commissioner James Quello  
Commissioner Rachelle Chong  
Commissioner Susan Ness  
Donald H. Gips, Chief  
Richard E. Smith, Chief  
William Kennard, Esq.  
John Stern, Esq.  
Christopher Wright, Esq.  
Peter Tenhula, Esq.  
Rosalee Chiara, Esq.  
Ronald Repasi  
Rodney Small  
Dan Phythyon

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provide "virtually seamless service." *Satellite CD Radio, Inc. Supplement to Pioneer's Preference Request* filed June 2, 1993, *Satellite CD Radio, Inc.*, GEN Docket No. 90-357, RM-7400, PP-24.

<sup>9</sup> The Commission need not, however, comment on the Panel's decision at all. It can simply find the recommendation moot in light of the subsequent withdrawal of all three pioneer's preference requests.

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